LOW MUN

v.

CHUNG KHIAW BANK LTD.

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
MOHD. AZMI SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 303 OF 1986]
13 JUNE 1987

BANKRUPTCY: *Did not quantify interest and costs awarded in judgment - Whether notice good for bankruptcy proceedings - Section 3(1)(i) Bankruptcy Act 1967 - Non-compliance with terms of judgment- Whether renders bankruptcy notice invalid - Creditor's petition filed subsequently specified interest rate and taxed costs - Whether the specified interest rate and taxed costs can be read into bankruptcy notice.*

BANKRUPTCY: *Bankruptcy Notice - Mode of substituted service - No order for posting of Notice on front door of debtor's last known address - Whether wrong exercise of discretion for Court not to include in the order - Deviation from prescribed Form - Effect - Section 62 Interpretation Act 1967 - Whether curable under s. 131 and Rule 274 Bankruptcy Legislation.*

This was an appeal against the adjudication and receiving orders made on 2 July 1986 by the High Court, Johor Bahru, against the appellant. He challenged the validity of the bankruptcy notice and also the service of the notice on him which was by substituted service on 2 December 1985.

The main issue for determination was whether a bankruptcy notice for the sum of RM2,325,000 and as well as for unspecified amount of interest and costs, is a good notice upon which bankruptcy proceedings may be founded under s. 3(1)(i) Bankruptcy Act 1967. The reason for the omission of the amount of interest and costs was that at the time of issue of the notice the base lending rate was not available and the costs of the proceedings had not been taxed. However, when the creditor's petition was subsequently filed, it did specify "10.25%" as the current base rate of interest and the sum of RM9,880.50 as being taxed costs claimed.

As for the service of the bankruptcy notice the first main argument in this appeal was based on the mode of substituted service and other alleged defects in the order for substituted service. There was no order for the posting of the notice on the front door of the debtor's last known address.

Held:

[1] Under r. 110 read with r. 97 of the Bankruptcy Rules 1969 the bankruptcy Court has a wide discretion to order the manner in which the substituted service should be effected. Having considered the evidence the Court was of the view that the substituted service had sufficiently complied with Form 15 of the Rules and since personal service could not be effected it was not a wrong exercise of discretion for the Court electing not to include in the order, posting of the notice at the last known address. The order for the substituted service was not defective.

[2] Form 15 of the Bankruptcy Rules had been substantially complied with and whatever deviation from the prescribed form is covered by s. 62 Interpretation Act 1967. The technical irregularities either in the form of typing errors or otherwise in the service of the bankruptcy notice are curable under s. 131 and r. 274 of the bankruptcy legislation. The Court was of the view that such formal and typographical defects or irregularities even if wholly proved cannot invalidate bankruptcy proceedings in this case.

[3] By demanding payment of unspecified sums in the bankruptcy notice the Court held that such demand was not in accordance with the terms of the judgment, and applying the rule of strict construction the notice cannot be deemed to fall within s. 3(1)(i) of the Bankruptcy Act. The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven days' period. Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and that failure to comply with such notice is not an act of bankruptcy and a bankruptcy petition founded on it must necessarily fail.

[4] The current base lending rate of "10.25%" and the taxed costs of "RM9,880.50" in the creditor's petition cannot be read into the bankruptcy notice. Thus, on the date of the issue of bankruptcy notice, it could not be said of the judgment on the interest and the costs that they constituted a judgment debt presently payable to the creditor, for they had not been quantified into a liquidated sum. It cannot be disputed that the whole of the judgment for the repayment of the principal sum of the loan, interest and costs, on which the bankruptcy notice was founded did not exist as a debt available for bankruptcy purposes at the time of the alleged act of bankruptcy, and that being the case the bankruptcy notice was a nullity ab initio, and the debtor is entitled to succeed.

[Appeal allowed with costs. Adjudication and receiving orders set aside. Deposit to be refunded to appellant.]

Cases referred to:
Teo Ah Bin v. Tan Kheng Guan [1981] 2 MLJ 146
In Re Chinery [1884] 12 QBD 342
Re Moore (a bankrupt) [1969] 113 Sol Jo 791
In Re Woodall, Ex Parte Woodall [1884] 13 QBD 479
In Re A Debtor [1938] 2 All ER 824
Re G.J., Ex Parte G.J. [1905] 2 KB 678
Ex Parte The Debtor v. Scott [1954] 3 All ER 74
Re A Debtor v. Slater Walker Ltd. [1981] 2 All ER 987
Re S.E. Menahem [1952] MLJ 136
In Re HB [1904] 1 KB 94

Legislation referred to:
Bankruptcy Act 1914 [UK], s. 1(1)(g)
Bankruptcy Act 1967, ss. 3(1)(i), 93(4)
Bankruptcy Rules 1969, rr. 97, 110, 131, 274
Interpretation Act 1967, s. 62

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 3, pp. 161, 162 & 167, para. 264

For the appellant - S.I. Rajah; M/s. S.I. Rajah & Partners
For the respondent - L.M. Ong; M/s. L.M. Ong & Co.

JUDGMENT

Mohd. Azmi SCJ:

On 2 July 1986 the appellant was adjudicated a bankrupt in the High Court at Johor Bahru. He is aggrieved by the decision to issue adjudication and receiving orders, and in the appeal before us, the appellant challenges not only the validity of the bankruptcy notice but also of the service of the notice on him. The main issue for determination is whether a bankruptcy notice for the sum of RM2,325,000 and as well as for unspecified amount of interests and costs is a good notice upon which bankruptcy proceedings may be founded under s. 3(1)(i) Bankruptcy Act 1967.

The appellant (hereinafter referred to as "the debtor") is one of the guarantors (i.e., sureties) in a loan transaction between Tuahbina Sdn. Berhad and the respondent bank (hereinafter referred to as "the creditor"). Arising from the said guarantee the creditor on 21 January 1985 obtained a final judgment against the Debtor *vide* Johor Bahru High Court civil suit No. 442 of 1984 in the principal sum of RM2,325,000 together with interests and costs. Based on the said judgment the creditor issued a bankruptcy notice dated 30 April 1985 against the debtor which *inter alia* contained the following demand:

> Take notice that within 7 days after service of this notice on you excluding the day of such service, you must pay to Chung Khiaw Bank Limited of Nos. 14, 16, Jalan Dato' Captain Ahmad, Kluang the sum of RM2,325,000 together with interest thereon at the rate of 3% above the Judgment Creditors' base rate of interest per annum with monthly rests in respect of the sum of RM2,100,000 and yearly rests in respect of the sum RM200,000 from 27 February 1983 until payment thereof and costs to be taxed claimed by them as being the amount due on final judgment obtained by them against you in Johore Bharu High Court Civil Suit No. 442 of 1984 dated 21 January 1985 whereon execution has not been stayed, ...

The bankruptcy notice was served on the debtor by substituted service on 2 December 1985; adjudication and receiving orders were granted on 2 July 1986 on a creditor's petition dated 6 January 1986.

The first main argument in this appeal, is based on the mode of substituted service and other alleged defects in the order for substituted service. The debtor was served with the bankruptcy notice by substituted service *vide* order of Court dated 3 September 1985 after attempts to serve by personal service had failed. The service was to be by posting a copy of the notice together with a copy of the order of substituted service on the notice board of the Court, and by publication of the notice in a Chinese language daily newspaper with national circulation. There was no order for the posting of the notice at the front door of the debtor's last known address. Under r. 110 read with r. 97 of the Bankruptcy Rules 1969, the bankruptcy Court has a wide discretion to order the manner in which the substituted service should be effected. Having considered the evidence, we are of the view that the substituted service had sufficiently complied with Form 15 of the Rules, and since personal service could not be effected, it was not a wrong exercise of discretion for the Court electing not to include in the order, posting of the notice at the last known address of the debtor. The case of *Teo Ah Bin v. Tan Kheng Guan* [1981] 2 MLJ 146 relied upon by the debtor has no application in this case. That authority concerns the power of the High Court to set aside an O. 14A judgment under the Rules of the Supreme Court 1957. The writ in that case was served by substituted service outside the jurisdiction and the Federal Court upheld the decision of the Court below in setting aside the summary judgment on the ground that the judgment was for a larger sum than what the plaintiff had claimed in his writ of summons. That being the case, there were no real necessity for the Court to consider whether the substituted service

by advertisement in a foreign press was proven to be wholly unlikely to come to the knowledge of the defendant. We are not persuaded that the order for the substituted service in the present case was defective. Form 15 of the Bankruptcy Rules had been substantially complied with and whatever deviation from the prescribed Form is covered by s. 62 Interpretation Act 1967. We also agree with Mr. Ong, Counsel for the Creditor that the technical irregularities either in the form of typing errors or otherwise in the service of the bankruptcy notice are curable under s. 131 and r. 274 of the bankruptcy legislation. We are therefore of the view that such formal and typographical defects or irregularities even if wholly proved cannot invalidate the bankruptcy proceedings in this case.

We now move to the next argument which is based on a more substantial ground. The bankruptcy notice in this case neither specified the bank base lending rate on which the interests payable should be calculated in accordance with the terms of the judgment; nor quantified the taxed costs. The reason for the omission was simply that at the time of issue of the notice, the base lending rate was not available and the costs of the proceedings had not been taxed. However, when the creditor's petition was subsequently filed, para. 2 thereof did specify "10.25%" as the current base rate of interest, and the sum of "RM9,880.50" as being the taxed costs claimed. It is submitted by Mr. Rajah on behalf of the debtor that as the demand in the bankruptcy notice was based upon the whole judgment obtained against the debtor, such bankruptcy notice was bad in law, for the reason that the claim included interests which had not been calculated in accordance with the creditor's base lending rate as required by the terms of the judgment. Such rate was stated in the judgment and was subject to fluctuation and as such there was uncertainty in the judgment. It is further submitted that the bankruptcy notice being founded upon a judgment which was bad for uncertainty, was itself bad in law as it was incapable of being complied with. Learned Counsel cited the statement of Bowen LJ in *In Re Chinery* [1884] 12 QBD 342 @ 346 which is quoted in *Halsbury's Laws of England*, 4th Edn., Vol. 3 at pp. 161 and 162 under a paragraph dealing with non-compliance with bankruptcy notice which states:

> Where words are found in a section of an Act which is defining an act of bankruptcy they should be construed as strictly as if they occurred in a section which was defining an offence, because the commission of the act of bankruptcy entails disabilities to the person who commits it.

To this submission, Mr. Ong for the creditor argues that by reproducing word for word the terms of the judgment in the bankruptcy notice, the creditor had complied with s. 3(1)(i). According to him, if the debtor had wanted to comply with the bankruptcy notice, he could easily have inquired from the creditor the amount of interests payable since the final amount could only be determined on date of payment. Further no attempt was made to set aside the bankruptcy notice. Mr. Ong elects not to reply directly to the debtor's argument on costs, but we assume his argument as to interests would also apply to costs viz. the creditor could have furnished the amount due if the debtor had asked for it. On Mr. Rajah's submission, we do not think that the judgment is bad in law for uncertainty, but the effect of the omission in the notice to quantify the amount of interests and costs due in accordance with the terms of the judgment, is a relevant issue. In a bankruptcy proceeding, proof of an act of bankruptcy must be clear and convincing since no person should be made bankrupt on an ambiguity (see *Re Moore (a bankrupt)* [1969] 113 Sol Jo 791). As to the principle for construing bankruptcy notices, we agree with the view that since bankruptcy is entirely a creation of statute law, the rule of strict construction should be applied to the legislative words creating the act of bankruptcy.

Section 3(1)(i) Bankruptcy Act 1967, which is identical with s. 1(1)(g) English Bankruptcy Act 1914 provides:

> A debtor commits an Act of Bankruptcy ... if a creditor has obtained a final judgment or final order against him for any amount, and execution thereon not having been stayed has served on him ... a bankruptcy notice under this Act requiring him **to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order,** ... and he does not within seven days (ten days in 1914 Act) after service of the notice ... either comply with the requirements of the notice or satisfy the Court that has a counter-claim, set off or cross demand ...
>
> Provided that for the purpose of this paragraph and of s. 5 of any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order. (emphasis supplied)

It is also essential that at the time of issue of the bankruptcy notice, the judgment creditor must be in the position to issue execution - see *In Re Woodall, Ex parte Woodall* [1884] 13 QBD 479. If part of the debt has been paid or unenforceable in bankruptcy, the notice can only be issued for the balance - see *In Re A Debtor* [1938] 2 All ER 824. Thus, a bankruptcy notice can only be issued for the judgment debt or that part on which the creditor can issue execution. In the present case, as at the date of issue of the bankruptcy notice only in respect of that part of the judgment debt of RM2,325,000 that the creditor could have issued execution. The remaining parts of the judgment debt on the interests on the loan and the costs of proceedings had not been quantified in accordance with the terms of the judgment, and hence these parts of the judgment debt were then incapable of being the subject of execution. In our view, the demand for payment of interests and costs were wrongly included in the bankruptcy notice because it was only after the issue of the notice i.e., when the creditor's petition was issued on 6 January 1986, that the creditor was able to ascertain the base lending rate of "10.25%' per annum, and also to quantify the costs at RM9,880.50 after taxation. Clearly, the bankruptcy notice was bad in law as it contained demand for payment of the whole judgment debt within seven days when parts of the whole debt had not been or could not be quantified, and as such, were incapable of being made the subject of execution, and consequently incapable of being complied with. Non-compliance with the demand to pay such unascertained sums cannot constitute an act of bankruptcy. The demand for payment in the notice must not only be quantified but must also be the correct sum owing as at the date of the notice. In the circumstances, the bankruptcy notice should have made it clear that the demand for payment was limited only to the principal sum of RM2.325 million, or both the interests and the costs should have been left out altogether and when their amounts had been ascertained, they could before adjudication be made the subject of a separate bankruptcy notice. Alternatively both the interests and the costs should be quantified first before notice was issued on the whole judgment debt. In any event, any balance of a judgment debt including interests and costs not demanded in the notice could subsequently be proved in bankruptcy to the Official Assignee under Part III of the Bankruptcy Act.

As regards costs, where a judgment is obtained for a certain sum and costs to be taxed, a bankruptcy notice can be issued for the amount of the judgment without the costs - see *Re GJ, Ex Parte GJ* [1905] 2 KB 678. The costs cannot be included or separately relied on until they have been taxed - *Ex Parte The Debtor v. Scott* [1954] 3 All ER 74. It should be observed that once the seven days have expired without the debtor having satisfied the debt or having satisfied the Court that he has a valid counter claim, an act of bankruptcy occurs by operation of law, and the Court has no jurisdiction under s. 93(4) to extend the period prescribed (see *Re A Debtor v. Slater Walker Ltd.* [1981] 2 All ER 987). In this country,

the Courts have for a long time recognised that a judgment for costs only would support a bankruptcy petition - see judgment of Sir Charles Murray-Aynsley CJ in *Re S.E. Menahem* [1952] MLJ 136.

Learned Counsel for the debtor relied heavily on the judgment of Sir Wilfred Greene MR in *Re A Debtor* (No. 21 of 1937) [1938] 2 All ER 824 for the proposition that inclusion of the untaxed costs in this case renders the whole of the bankruptcy notice bad in law. In that case the Court of Appeal held that the issue of the bankruptcy notice for the sum of 78 pounds 18 shillings 6 pence founded on a judgment debt for that amount was a step in the enforcement of the judgment in bankruptcy, and, the judgment being one which by virtue of the inclusion in it of a debt incurred before 2 August 1935 (the date of the coming into operation of the Law Reform (Married Women and Tortfeasors) Act 1935) could not be enforced in bankruptcy, the bankruptcy notice was a nullity *ab initio* and no petition could be found upon it. Since the said judgment was indivisible, a bankrupt notice in respect of a judgment debt which was in part unenforceable, was held invalid and could not be saved by calling in aid the principles whereby the Court might scale down the amount of the debt on the hearing of the petition (see *Halsbury's Laws of England*, 4th Edn., Vol. 3 at p. 167 para. 264). In the present case the facts are even worse, because even if the judgment for the principal loan, interests and costs are divisible, the bankruptcy notice being founded on the whole judgment under s. 3(1)(i) were not "in accordance with the terms of the judgment", for apart from the principal loan of RM2,325,000 there was non-compliance with the terms of the judgment as regards interests and costs. The interests claimed ought to have been quantified as at the date of issue of notice i.e. "at the rate of 3% above the base rate of interest per annum" (which we now know to be at 10.25%) "with monthly rests in respect of the sum of RM2,100,000 and yearly rests in respect of the sum of RM200,000 from 27 February 1983." Similarly the costs should have been "taxed as between party and party" before the date of issue of notice (which we now know to be RM9,880.50). Instead, the creditor merely reproduced the terms of the judgment on the interests and costs in the bankruptcy notice without quantifying the amounts claimed to be due. The Bankruptcy Act provides expressly that the notice must be to pay the judgment debt "in accordance with the terms of the judgment". Thus in *In Re HB* [1904] 1 KB 94 a bankruptcy notice was held to be bad if found not according to its terms but on some agreement which modified the terms of the judgment, and therefore not in accordance with the terms of the judgment. Consequently, we are of the view that when you have the judgment in the usual form that we have here, a bankruptcy notice under the Act must require payment of quantified sum or sums alleged to be due according to the terms of the judgment as at the date of issue of bankruptcy notice. The duty is on the creditor to state the correct amount due, and there is no obligation imposed on the debtor to make inquiries if the amount demanded is ambiguous or unascertained. By demanding payment for unspecified sums in the bankruptcy notice, we hold that such demand is not in accordance with the judgment, and applying the rule of strict construction, the notice cannot be deemed to fall within s. 3(1)(i) of the Bankruptcy Act. The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven days' period. Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and that failure to comply with such notice is not an act of bankruptcy, and a bankruptcy petition founded on it must necessarily fail. As stated by Sir Raymond Evershed in *Ex parte The Debtor v. Scott (ante)* at p. 78:

> At each stage of these (bankruptcy) proceedings, you should take the facts as you found them. (p. 78A)

> I think there is a further requirement which emerges from what has been called the common law of bankruptcy, i.e. the rules or principles which the Courts have held to be applicable in bankruptcy proceedings, though in terms this requirement does not appear to be expressly stated in the statute. The requirement, in my judgment, is that the petitioning creditor's debt must also be shown to have existed and to have the necessary character and quality stated in s.4 at the date of the act of bankruptcy as well as at the dates of the presentation and hearing of the petition. (p. 78H)

Applying these statements to the present case, the current base lending rate of "10.25% and the taxed costs of "RM9,880.50" in the creditor's petition cannot be read into the bankruptcy notice. Thus, on the date of issue of bankruptcy notice, it could not be said of the judgment on the interests and the costs that they constituted a judgment debt presently payable to the creditor, for they had not been quantified into a liquidated sum. it cannot be disputed that the whole of the judgment for the repayment of the principal sum of the loan, interests and costs, on which the bankruptcy notice was founded did not exist as a debt available for bankruptcy purposes at the time of the alleged act of bankruptcy, and that being the case the bankruptcy notice was a nullity *ab initio*, and the debtor is entitled to succeed.

For the above reasons we allow the appeal with costs and set aside the adjudication and receiving orders. We also order the deposit to be refunded to the appellant.

Also found at [1987] 2 CLJ 400